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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 888 / 3

EARLE S. WELCH, APPELLANT,

vs.

ROBERT K. HENRY AND SOLOMON LEVITAN,
STATE TREASURER OF THE STATE OF WIS-
CONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED MARCH 21, 1938.

SUPREME COURT OF THE UNITED STATES

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[fols. 1-5] STATE OF WISCONSIN,
County of Dane, ss:

I hereby certify that on the 23rd day of July, 1935, at the City of Madison, in said county and state of Wisconsin, I served the within Summons and Complaint on the within named defendant Robert K. Henry, State Treasurer of the State of Wisconsin by then and there delivering to and leaving with him personally a true copy thereof, and I also certify that at the time of said service I endorsed upon the copy so served, the date upon which the same was served and signed my name thereto, and added thereto my official title.

Lawrence O. Larson, Sheriff, by A. N. Dohle, Deputy Sheriff.

[fol. 6] [File endorsements omitted]

IN CIRCUIT COURT OF EAU CLAIRE COUNTY

EARLE S. WELCH, Plaintiff,

vs.

ROBERT K. HENRY, State Treasurer of the State of Wisconsin, Defendant

SUMMONS—Filed July 30, 1935.

The State of Wisconsin to Said Defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you according to the demands of the complaint, of which a copy is herewith served upon you.

Bundy Beach & Holland, Attorneys for Plaintiff.

P. O. Address: 401-408 S. A. F. Bldg., Eau Claire,
Eau Claire County, Wisconsin.

[fol. 7]

[File endorsements omitted]

IN CIRCUIT COURT OF EAU CLAIRE COUNTY

EARLE S. WELCH, Plaintiff,

vs.

ROBERT K. HENRY, State Treasurer of the State of Wisconsin, Defendant

COMPLAINT—Filed July 30, 1935

The above named plaintiff, by Bundy, Beach & Holland, his attorneys, complains of the above named defendant and for a cause of action alleges and states:

That the defendant is a resident of the City of Madison, Wisconsin, and is the duly qualified and acting State Treasurer of the State of Wisconsin; that suit against him as such public official on account of the matters and things hereinafter set forth is specifically authorized by Section 6 (3) (c) (5) of Chapter 15 of the Laws of 1935.

That plaintiff is a resident of the State of Wisconsin engaged in the insurance business and was such resident during the year 1933; that during said year the plaintiff received gross income totalling \$13,383.26 from all sources as follows:

| | |
|-------------|------------|
| Commissions | \$608.74 |
| Interest | 558.42 |
| Rent | 60.00 |
| Dividends | 12,156.10; |

that during said year plaintiff paid in taxes that he was entitled to deduct for income tax purposes the sum of \$72.68; that during said year the plaintiff paid interest in the sum of \$1,420.25; that during said year the plaintiff sustained a net loss from the sale of securities in the sum of \$8,518.84; that during said year the plaintiff expended the sum of \$1,050.20 in ordinary and necessary business expenses; that the total of such payments and *and* losses was \$1, [fol. 8] 061.97, leaving the plaintiff with an actual income during said year of \$2,321.29; that during said year the plaintiff made donations properly deductible for income tax purposes in the sum of \$100.00;

That of the dividends above mentioned received by the plaintiff in the year 1933, \$4,153.60 thereof were received

from the Eau Claire Press Company, a Wisconsin corporation doing business in the city of Eau Claire, Wisconsin, and \$7,980.00 thereof were received from the National Pressure Cooker Company, a Wisconsin corporation doing business in Eau Claire, Wisconsin, making a total of \$12,133.60 of such dividends which the plaintiff was entitled to deduct for purposes of determining his 1933 income subject to normal income tax in said year. The plaintiff during the year 1933 was not employed by or active in the business of either said Eau Claire Press Company or said National Pressure Cooker Company. He was not an officer or director of either of said companies but held the stock thereof as an investment for the purpose of receiving the dividends therefrom.

That on or about the 15th day of March, 1934, the plaintiff made a true and correct return of his income during the year 1933, setting out the matters and things above set forth; that by said return it appeared that the plaintiff had a total income during the year 1933 of \$13,383.26; that plaintiff was entitled to deduct from said sum for normal income tax purposes the sum of \$23,195.57, and that included in said deductions were the above mentioned dividends from Wisconsin corporations in the total amount of \$12,133.60; that as a result thereof the plaintiff had no net income for the year 1933 subject to normal tax.

That shortly prior to the 15th day of May, 1935, defendant received from the Wisconsin Tax Commission a bill for Emergency Relief taxes purported to be assessed under the provisions of Section 6 of said Chapter 15 of the laws of 1935 in the sum of \$556.84; that by said bill for taxes and by [fol. 9] the provisions of said Chapter 15 of the Laws of 1935, plaintiff was threatened with the imposition of penalties and forfeitures and with the forcible collection thereof and of said tax if the same was not paid, and that solely to avoid the imposition of such penalties and to prevent the forcible collection of said purported tax as so threatened plaintiff paid to the Wisconsin Tax Commission the sum of \$545.71, being the amount of the tax so assessed, less a discount of 2% thereof, on the 15th day of May, 1935; that said payment was made under protest and accompanied by a written statement of the plaintiff protesting the imposition and collection of said purported tax; that this suit is brought for the recovery of the amount so paid as provided in Section 6 of said Chapter 15 of the Laws of 1935.

That said Section 6 of Chapter 15 of the Laws of 1935 is illegal, unconstitutional, and invalid as applied to this plaintiff for the following reasons:

1. The said Act purports to tax income received by the petitioner from dividends during the year 1933. Normal income tax upon income for that period is levied under the provisions of Chapter 72 of the Wisconsin Statutes, and it is beyond the power of the Legislature to now retroactively assess tax on the income of that year, said income having already been taxed and become a part of the plaintiff's capital. The purported tax thereon at this time is equivalent to a property tax not levied equally upon all property owners and not based upon any reasonable classification of property or tax payers and therefore contrary to the provisions of Article VIII, Section 1 of the Wisconsin Constitution and of Section 1 of the XIVth Amendment to the Constitution of the United States since it denies to the plaintiff the equal protection of the laws.

2. Plaintiff's entire income for the year 1933 amounted to the sum of \$13,383.26. His deductions other than dividends from Wisconsin corporations for said period amounted to \$11,061.97 plus donations of \$100.00, making a [fol. 10] total of \$11,161.97, so that even including the dividends received by him from Wisconsin corporations the taxpayer's total net income for said year was \$2,221.39, yet by the provisions of said Section 6 of Chapter 15 of the laws of 1935 the taxpayer has been assessed upon the sum of \$12,133.60. Said tax is not authorized as an income tax under Section 1 of Article VIII of the Wisconsin Constitution since it is imposed by a sum greatly in excess of the taxpayer's actual net income for said year. Said tax is not authorized as a tax on occupations under said section since it is not imposed with relation to any occupation or business of the plaintiff. Said tax is not authorized as a privilege tax under said section because no privilege is granted the plaintiff in connection therewith not an indispensable part of the ownership of said stock. The period during which said dividends were received has already passed.

The true nature of said tax is a tax on plaintiff's stock as property and upon the dividends received. As such the tax is not levied upon any uniform rule as required by Article VIII Section 1 of the Wisconsin Constitution but is discriminatory, arbitrary and in violation of said section

and of Section 13, Article I of said constitution and of the XIVth amendment to the Constitution of the United States.

Wherefore, the plaintiff demands judgment against the defendant as State Treasurer of the State of Wisconsin in the sum of \$545.71, together with interest at the rate of 6% from the 15th day of May, 1935.

Bundy, Beach & Holland, Attorneys for Plaintiff.

[fols. 11-12] *Duly sworn to by Earle S. Welch. Jurat omitted in printing.*

[fol. 13] IN CIRCUIT COURT OF EAU CLAIRE COUNTY

[Title omitted]

DEMURRER TO COMPLAINT—Filed October 22, 1935

Now comes the above named defendant, Robert K. Henry, State Treasurer of the State of Wisconsin, by James E. Finnegan, Attorney General, and Herbert H. Naujoks, Assistant Attorney General, his attorneys, and demurs to the complaint herein on the ground that it appears on the face of the said complaint that the same does not state facts sufficient to constitute a cause of action against him.

James E. Finnegan, Attorney General; Herbert H. Naujoks, Assistant Attorney General, Attorneys for Defendant.

[fols. 14-22] Due and person service of the within Demurrer admitted this 22nd day of October 1935.

Bundy, Beach & Holland, Attorney for Plaintiff.

[File endorsements omitted.]

[fol. 23] IN CIRCUIT COURT OF EAU CLAIRE COUNTY

[Title omitted]

ORDER OVERRULING DEMURRER—Filed February 7, 1936

The defendant having demurred to the plaintiff's complaint on the ground that it appears on the face thereof that it does not state facts sufficient to constitute a cause

of action, and the court having considered the arguments and briefs of counsel on said demurrer,

It is Ordered, That said demurrer be and it is hereby overruled with permission on the part of the defendant to answer said complaint within twenty days from the date of this order on payment of ten dollars costs.

Dated, February 7, 1936.

By the Court.

James Wickham, Judge.

[fols. 24-27] [File endorsements omitted.]

[fol. 28] [File endorsement omitted.]

IN SUPREME COURT OF WISCONSIN

EARLE S. WELCH, Respondent,

vs.

ROBERT K. HENRY, State Treasurer, Appellant

Appeal from an order of the Circuit Court for Eau Claire County. James Wickham, Circuit Judge. Reversed.

OPINION—Filed January 12, 1937

This was an action commenced on July 23, 1935, by Earle Welch, as plaintiff, against Robert K. Henry, State Treasurer of the state of Wisconsin, defendant, to recover the sum of \$745.71 paid by plaintiff under protest as an income tax pursuant to sec. 6, Ch. 15, Laws of 1935. The complaint alleged that during the year 1933, plaintiff received a total income of \$13,383.26, of which \$12,133.60 was in the form of dividends from Wisconsin corporations; that under the income tax laws then in effect, Ch. 71, Stats. 1933, plaintiff was entitled to deduct from his gross income the full amount of such dividends; that in addition plaintiff was entitled to deductions from his gross income for 1933 amounting to \$11,161.97, plus donations of \$100, making a total of \$11,161.97; that as a result thereof the plaintiff had no net income for the year 1933 subject to tax; that shortly prior to the 15th day of May, 1935, defendant received from the Wisconsin tax Commission a bill for emergency relief tax assessed under the provisions of sec. 6, Ch. 15, Laws of

1935, in the sum of \$556.84, which amount less a 2% discount plaintiff paid under protest; that sec. 6, Ch. 15, Laws of 1935, is unconstitutional and invalid. Judgment is deferred [fol. 29] mandated against the defendant as State Treasurer of the state of Wisconsin in the sum of \$545.71, together with interest. Defendant demurred to the complaint upon the ground that the same does not state facts sufficient to constitute a cause of action against him. On February 7, 1936, the lower court entered an order overruling defendant's demurrer. Defendant appeals.

[fol. 30] WICKHAM, J.:

The sole question upon this appeal is the constitutionality of sec. 6, Ch. 15, Laws of 1935, which is entitled, "Emergency Relief Tax on Certain 1933 Dividends."

The material portions of the statute here in question are as follows:

"(1) For the purpose of this section

"(a) 'Person' shall mean persons other than corporations as defined in subsection (1) of section 71.02.

"(b) 'Dividends' shall mean all dividends derived from stocks whether paid to shareholders in cash or property received in the calendar year 1933, or corresponding fiscal year, and deductible under subsection (4) of section 71.04.

"(d) 'Net dividend income' shall mean gross dividend income less seven hundred and fifty dollars.

"(2) To provide revenues for relief purposes there is levied and there shall be assessed, collected, and paid, an emergency tax upon the net dividend income of all persons in the calendar year 1933 or corresponding fiscal year at the following rates:

"(a) On the first two thousand dollars of net dividend income or any part thereof, at the rate of one percent.

"(b) On the next three thousand dollars of net dividend income or any part thereof, at the rate of three percent.

"(c) On all net dividend income above five thousand dollars, at the rate of seven percent."

Plaintiff's first contention is that the act is discriminatory and obnoxious to the provisions of the 14th amend-

ment to the United States Constitution as well as to secs. (1) and (22) of Art. 1, Wisconsin constitution. These sections read as follows:

"Section 1. All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

"Section 22. The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."

Both plaintiff and defendant concede that while the legislature may classify persons for purposes of taxation, the classification must be based on reasonable differences or [fol. 31] distinctions which distinguish the members of a class from those of another in respects germane to some general and public purpose or object of the particular legislation. *Louisville Gas & Electric Co. v. Coleman*, 277 U. S. 32. This rule is well settled and calls for no further exposition here. Plaintiff's claim is based upon the fact that under the law as it existed in 1933, and upon which plaintiff reported and paid his income taxes for that year, there was allowed to him as a deduction dividends received from Wisconsin corporations. The emergency relief tax enacted in 1935 levied a graduated tax upon dividends from Wisconsin corporations received in 1933 and at that time deductible from plaintiff's gross income. It is contended that there is no difference between plaintiff and persons receiving no income from dividends paid by Wisconsin corporations that reasonably warrants such classification. It is not contended that the legislature in 1933 could not have abolished the exemption of this dividend income if the net result had merely been to throw into the total of assessable income for the year 1933, the Wisconsin dividend of a particular taxpayer and subject it to the normal taxes for that year. However, had the legislature done this, the result would have been a general income tax, and the dividend income would have been treated on a parity with all of the taxpayer's other income. It would have been subject to the same deductions, and he could have subtracted from it the same losses that he could as against any other sort of income and it would have been taxed on an absolute parity

with such other income. It is obvious that the question here is quite different. The question is whether the legislature having theretofore exempted dividends received from Wisconsin corporations from a normal tax may by [fol. 32] separate act subject them to a special tax for emergency relief purposes. It is clear to us that there is but a single ground of differentiation, and that the classification must stand or fall upon this ground. Does the fact that the taxpayers who received dividends of Wisconsin corporations were exempt from a normal tax in 1933 so differentiate them from other persons receiving dividends during this year as to justify the subsequent levy upon them of a special income tax to meet a particular public emergency? As thus stated, two questions are involved: (1) Is the classification a valid one, and (2) whatever the answer to this may be, is there in fact any discrimination against a person receiving income from Wisconsin dividends. If the first question receives an affirmative answer, the law is valid so far as its alleged discriminatory features are concerned. If the second question receives a negative answer, plaintiff has no standing to attack it since his rights are not adversely affected. It is our conclusion that the fact that the income had previously been exempt from a normal tax is a sufficient reason for giving it different treatment upon the emergency tax. It does not impress us as material upon the issue of discrimination whether the previous exemption was accomplished by taxing all income except that derived from dividends of Wisconsin corporations or by taxing all income and allowing the deduction of income from this source. These are mere matters of form. The net result was that this income had not been subjected to a normal tax. In searching for subjects of emergency taxation, the legislature for this very reason might impose a special tax for emergency relief upon the recipients of this type of income. The reason [fol. 33] for imposing a special burden is as valid as that for exempting it from the normal burden. See, *State ex rel. Atwood v. Johnson*, 170 Wis. 218, 175 N. W. 589; *C. & N. W. R. Co. vs. State*, 128 Wis. 553, 108 N. W. 537. Some point is made of the fact that the emergency tax upon this particular type of income is at a rate higher than the normal tax. We are not satisfied that such is the case. While the rates are nominally higher, it may well have been considered that this income, if added to the balance of the

taxpayer's income, would normally be taxed in the higher rather than the low brackets of the normal tax, and this factor could be taken account of in establishing rates for the special tax. Recognition of this principle appears to have been given in the case of *Colgate v. Harvey*, 296 U. S. 404. Whatever may be the proper conclusion as to the classification, we do not think plaintiff can claim to have been discriminated against, when the whole pattern of tax legislation is considered. It is not apparent to us that one who is exempt from the burden of annually responding to a normal income tax has been injured by requiring him to meet that of an occasional emergency tax. It might with equal or greater force be argued that the original act discriminated against persons receiving income from sources other than dividends of Wisconsin corporations. This being true, plaintiff has no standing to object to the classification adopted.

It is also contended that there is discrimination as between members of the same class for the reason that only a fixed sum is deductible from the net income which does not vary in accordance with the circumstances or amount of the net income of a stockholder receiving dividend income from Wisconsin corporations. We do not consider this objection to be valid. Considering the class to consist [fol. 34] of all persons receiving dividends from Wisconsin corporations, all are treated alike, taxed alike, given the same deduction, and the same rate of tax. So long as this is properly treated as an income tax, the progressive character of the rates cannot be considered to be objectionable. It is our conclusion that there is no clear indication here that the purpose or effect of the act is a hostile or oppressive discrimination against particular persons or classes. *Beers vs. Glynn*, 211 U. S. 477, *Citizens Telephone Co. vs. Fuller*, 229 U. S. 322.

The foregoing consideration of plaintiff's claim that the act is discriminatory took no account of the retroactive features of the law under examination. It now becomes proper to consider plaintiff's objection that the law is invalid because of these features. It is plaintiff's claim that the legislature is authorized to make income tax provisions retroactive during the year of enactment and during the preceding year where the tax upon such preceding year has not been determined and paid, but that it is beyond the power of the legislature to tax dividends received in 1933

by a statute passed in 1935. We deem this objection to be unsound. It was held in *Van Dyke vs. Tax Comm.*, 217 Wis. 538, 259 N. W. 700, that an income tax which is given retroactive effect by the legislature cannot properly be assailed on constitutional grounds if it applies to the year in which the law is enacted or if it applies to prior but recent transactions. This is also the rule as announced by the United States Supreme Court. *Brushaber vs. Union Pacific R. Co.*, 240 U. S. 1; *Lynch v. Hornby*, 247 U. S. 339; *Cooper vs. U. S.*, 280 U. S. 409. In the *Cooper* case it is said that,

"That the questioned provision cannot be declared in conflict with the Federal Constitution merely because it requires gains from prior but recent transactions to be treated as part of the taxpayer's gross income has not been open to serious doubt since *Brushaber vs. Union Pacific R. Co.*, 240 U. S. 1 and *Lynch vs. Hornby*, 247 U. S. 339."

[fol. 35] It is our conclusion (1) that under this rule the legislature may measure an income tax by the income of a year sufficiently recent so that the income of that year may reasonably be supposed to have some bearing upon the present ability of the taxpayer to pay the tax, and (2) that the legislature, subject to this limitation, may go back at least to the most recent year for which they have returns furnishing data upon which to estimate the total return of the tax to the state. While the present tax may approach or reach the limit of permissible retroactivity, it does not exceed it.

The next two contentions of plaintiff may properly be considered together. They are that the tax is not authorized by the authority contained in section 1, Art. VIII, Wisconsin constitution for the imposition of taxes on income because while it purports to be a tax upon income, it is either (a) a graduated tax on gross receipts in which case it is void under the authority of *Schuster v. Henry*, 218 Wis. 506, 261 N. W. 20, and *Stewart Dry Goods Co. vs. Lewis*, 294 U. S. 550, or (b) that, being levied solely upon income from a particular kind of property, the subject of the tax is so closely bound up with the ordinary attributes of ownership that it amounts to a tax upon the property itself and as such violates the constitutional requirement of uniformity. Article VIII, section 1, provides as follows:

"the rule of taxation shall be uniform, and taxes shall be levied upon such property with such classifications as to

forests and minerals, including or separate or severed from the land, as the legislature shall prescribe. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

The general principle underlying these contentions is that a tax measured in terms of income from a business, [fol. 36] occupation or a particular kind of property is not an income tax within the meaning of that term as used in the constitution, but that it constitutes either an occupation or privilege tax in which case it must not be levied retrospectively, or a property tax, in which case it must satisfy the constitutional requirements of uniformity. The contention proves too much. If there is any validity to the contention, then a tax may only be considered an income tax if levied upon all the actual net income of a taxpayer. The exclusion from the operation of a taxing statute of the income from any particular source would destroy the income character of the tax. This would follow whether the statute expressly subjected all income to its operation, and then allowed as a deduction income from particular kinds of property, or was made applicable to less than all of the taxpayer's income. As stated before, these are mere matters of form. Hence, if plaintiff's contention be true, the income tax law of 1933 was no more an income tax than is the special act under examination here. It is our conclusion that a tax upon the net income from a particular kind of property is within the constitutional description of income taxes and is not a privilege tax or one upon the property from which the income is derived. This is, of course, true only if the tax be upon the net income. A tax upon the gross income of particular kinds of property or particular taxpayers or a particular business is doubtless within the condemnation of the Stewart and the Schuster cases, supra, and constitutes in effect a tax upon the property itself. However, taxation upon income from dividends falls in a different class. In cases to which this tax is applicable, the income is in a real sense net income to the taxpayer. The expenses of producing the income have been allowed to the corporation prior to its distribution as a [fol. 37] dividend. There are no losses or expenses to be deducted so far as this income is concerned; and if there were, the gross deduction of \$750 may well be supposed suf-

ficiently to meet any minor expenses that may conceivably be imagined in connection with the production of the income. Thus, the tax is not upon gross receipts, or at least the gross receipts are not receipts so far as the particular items of income is concerned. It is our conclusion, therefore, that the tax in question constitutes an income tax; that a reasonable deduction is allowed to the taxpayer; and that being an income tax, there is no constitutional objection to the imposition of a graduated or progressive rate of tax upon such income. These conclusions sufficiently deal with the contention that the tax is a privilege tax and that it cannot be retroactively applied. It follows that the order must be reversed.

By the court: Order reversed, and cause remanded with directions to sustain the demurrer.

[fol. 38] Clerk's certificate to foregoing paper omitted in printing.

[fol. 39] IN SUPREME COURT OF WISCONSIN

EARLE S. WELCH, Respondent,

VS.

ROBERT K. HENRY, State Treasurer of the State of Wisconsin, Appellant

Appeal from Circuit Court Eau Claire County, State of Wisconsin

JUDGMENT—January 12, 1937

This cause came on to be heard on appeal from the order of the Circuit Court of Eau Claire County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the Circuit Court of Eau Claire County, appealed from in this cause, be, and the same is hereby, reversed,

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to sustain the demurrer.

Justices Fowler, Fairchild and Nelson dissent.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 40] IN CIRCUIT COURT OF EAU CLAIRE COUNTY

ACKNOWLEDGMENT OF SERVICE—Filed July 31, 1937—

The undersigned, Attorney General of the State of Wisconsin, attorney for the within named defendants, hereby acknowledges service of the copy of the within Complaint this 23rd day of July, 1937, together with the sum of Ten Dollars (\$10.00) costs upon the service of said Complaint as set out in the order of the Circuit Court for Eau Claire County dated July 22, 1937.

Orland S. Loomis, Attorney General, by A. G. Hawley, Assistant Attorney General, Attorney for the Within Named Defendants, Robert K. Henry and Solomon Levitan as State Treasurer.

[File endorsement omitted.]

[fol. 41] IN CIRCUIT COURT OF EAU CLAIRE COUNTY

EARLE S. WELCH, Plaintiff,

VS.

ROBERT K. HENRY and SOLOMON LEVITAN, as State Treasurer of the State of Wisconsin, Defendants

AMENDED COMPLAINT—Filed July 21, 1937

The above named plaintiff, by Bundy, Beach & Holland, his attorneys, complains of the above named defendants and for a cause of action alleges and states:

That the defendants are residents of the City of Madison, Wisconsin; that the defendant Robert K. Henry was the duly qualified and acting State Treasurer of the State of Wisconsin at the time of the service of the original complaint herein; that the defendant, Solomon Levitan, is the successor to said Robert K. Henry in such office and is the present duly qualified and acting State Treasurer of the State of Wisconsin; that suit against said defendants as such public officials on account of the matters and things hereinafter set forth is specifically authorized by Section 6 (3) (c) (5) of Chapter 15 of the Laws of 1935, and the inclusion of Solomon Levitan as a defendant in this amended complaint was specifically authorized by order of the court of July 22, 1937.

That plaintiff is a resident of the State of Wisconsin engaged in the insurance business and was such resident during the year 1933; that during said year the plaintiff received gross income totaling \$13,383.26 from all sources as follows:

| | |
|-------------|-----------|
| Commissions | \$608.74 |
| Interest | 558.42 |
| Rent | 60.00 |
| Dividends | 12,156.10 |

that during said year plaintiff paid in taxes that he was entitled to deduct for income tax purposes the sum of \$72.68; that during said year the plaintiff paid interest in the sum of \$1,420.25; that during said year the plaintiff sustained a net loss from the sale of securities in the sum of \$8,518.84; that during said year the plaintiff expended [fol. 42] the sum of \$1,050.20 in ordinary and necessary business expenses; that the total of such payments and losses was \$11,061.97, leaving the plaintiff with an actual income during said year of \$2,321.29; that during said year the plaintiff made donations properly deductible for income tax purposes in the sum of \$100.00.

That of the dividends above mentioned received by the plaintiff in the year 1933, \$4,153.60 thereof were received from the Eau Claire Press Company, a Wisconsin corporation doing business in the city of Eau Claire, Wisconsin, and \$7,980.00 thereof were received from the National Pressure Cooker Company, a Wisconsin corporation doing business in Eau Claire, Wisconsin, making a total of \$12,133.60 of such dividends which the plaintiff was entitled to deduct for purposes of determining his 1933 income subject to normal income tax in said year under the provisions of Subsection 4 of Section 71.04 of the Wisconsin Statutes. The plaintiff during the year 1933 was not employed by or active in the business of either said Eau Claire Press Company or said National Pressure Cooker Company. He was not an officer or director of either of said companies but held the stock thereof as an investment for the purpose of receiving the dividends therefrom.

That on or about the 15th day of March, 1934, the plaintiff made a true and correct return of his income during the year 1933, setting out the matters and things above set forth; that by said return it appeared that the plaintiff

had a total income during the year 1933 of \$13,383.36; that plaintiff was entitled to deduct from said sum for normal income tax purposes the sum of \$23,195.57, and that included in said deductions were the above mentioned dividends from Wisconsin corporations in the total amount of [fol. 43] \$12,133.60; that as a result thereof the plaintiff had no net income for the year 1933 subject to normal tax.

That by a certain Act of the Wisconsin Legislature entitled "An Act to Raise Revenues for Emergency Relief Purposes, and Making Appropriations", which said Act was published on the 27th day of March, 1935, it was provided that certain taxes should be levied upon and assessed against the taxpayers therein mentioned for the purposes therein set forth and in particular by Section 6 of said Act it was provided that a tax should be levied and assessed upon "net dividend income" as therein defined received by persons subject thereto in the calendar year 1933 at the graduated and progressive rates therein set forth.

That shortly prior to the 15th day of May, 1935, plaintiff received from the Wisconsin Tax Commission a bill for Emergency Relief taxes purported to be assessed under the provisions of Section 6 of said Chapter 15 of the Laws of 1935 in the sum of \$556.84; that by said bill for taxes and by the provisions of said Chapter 15 of the Laws of 1935, plaintiff was threatened with the imposition of penalties and forfeitures and with the forcible collection thereof and of said tax if the same was not paid, and that solely to avoid the imposition of such penalties and to prevent the forcible collection of said purported tax as so threatened plaintiff paid to the Wisconsin Tax Commission the sum of \$545.71, being the amount of the tax so assessed, less a discount of 2% thereof, on the 15th day of May, 1935; that said payment was made under protest and accompanied by a written statement of the plaintiff protesting the imposition and collection of said purported tax; that this suit is brought for the recovery of the amount so paid as provided in Section 6 of said Chapter 15 of the Laws of 1935.

[fol. 44] That said Section 6 of Chapter 15 of the Laws of 1935 is illegal, unconstitutional, and invalid as applied to this plaintiff for the following reasons:

1. The said Act passed in 1935 purports to tax "dividend income" received by the petitioner from dividends during

the year 1933. Normal income tax upon income for that period is levied under the provisions of Chapter 72 of the Wisconsin Statutes which were in effect during the year 1933. The income and receipts of the plaintiff during the year 1933 have already been subjected to tax by the statutes as in existence during the year 1933 and have become a part of the plaintiff's capital. The purported tax upon receipts from dividends in 1933 by an Act passed in 1935 is not based upon any reasonable classification of property or taxpayers but is arbitrary and discriminatory. There is no reasonable relation between the amount of dividends received by the plaintiff during 1933 and the benefits enjoyed by him from the State of Wisconsin, or his ability to pay in 1935 and the retroactive assessment of said tax is contrary to the provisions of Section 1 of Article VIII of the Wisconsin Constitution and of Section 1 of the XIVth Amendment to the Constitution of the United States since it denies to the plaintiff the equal protection of the laws and takes the plaintiff's property without due process of law.

2. Said Section 6 of Chapter 15 of the Laws of 1935 levies a tax at a graduated and progressive rate measured only by the dividends as therein mentioned received by the taxpayer during 1933 without regard to losses or expenses which the taxpayer had during said period and without regard to the actual net income of the taxpayer from all his business activities during said year. The said tax is therefore arbitrary and discriminatory and not based upon any reasonable classification of taxpayers and is contrary [fol. 45] to the provisions of Section 1 of Article VIII of the Wisconsin Constitution and of Section 1 of the XIVth Amendment to the Constitution of the United States since it denies to the plaintiff the equal protection of the laws and takes his property without due process of law.

3. Plaintiff's entire income for the year 1933 amounted to the sum of \$13,383.26. His deductions other than dividends from Wisconsin corporations for said period amounted to \$11,061.97 plus donations of \$100.00, making a total of \$11,161.97, so that even including the dividends received by him from Wisconsin corporations the taxpayer's total net income for said year was \$2,221.39, yet by the provisions of said Section 6 of Chapter 15 of the laws

of 1935 the taxpayer has been assessed upon the sum of \$12,133.60. Said tax is not authorized as an income tax under Section 1 of Article VIII of the Wisconsin Constitution since it is imposed by a sum greatly in excess of the taxpayer's actual net income for said year. Said tax is not authorized as a tax on occupations under said section since it is not imposed with relation to any occupation or business of the plaintiff. Said tax is not authorized as a privilege tax under said section because no privilege is granted the plaintiff in connection therewith not an indispensable part of the ownership of said stock. The period during which said dividends were received has already passed.

The true nature of said tax is a tax on plaintiff's stock as property and upon the dividends received. As such the tax is not levied upon any uniform rule as required by Article VIII Section 1 of the Wisconsin Constitution but is discriminatory, arbitrary and in violation of said section and of Section 13, Article I of said Constitution and of the XIVth amendment to the Constitution of the United States.

[fol. 46] Wherefore, the plaintiff demands judgment against the defendants as State Treasurer of the State of Wisconsin in the sum of \$545.71, together with interest at the rate of six per cent from the 15th day of May, 1935.

Bundy, Beach & Holland, Attorneys for Plaintiff.

Duly sworn to by Earle S. Welch. Jurat omitted in printing.

[fol. 47] [File endorsements omitted.]

[fol. 48] IN CIRCUIT COURT OF EAU CLAIRE COUNTY

[Title omitted]

DEMURRER TO AMENDED COMPLAINT—Filed July 31, 1937

Now come the above named defendants, by Orland L. Loomis, Attorney General and A. G. Hawley, Assistant Attorney General, their attorneys, and demur to the complaint herein on the grounds that it appears on the face

of said complaint that the same does not state facts sufficient to constitute a cause of action against them.

Orland S. Loomis, Attorney General; A. G. Hawley, Assistant Attorney General, Attorneys for Defendants.

[File endorsements omitted.]

[fols. 49-51] Due and personal service of the within Demurrer admitted this 21st day of July 1937.

Bundy, Beach & Holland, Attorneys for Plaintiff.

[fol. 52] IN CIRCUIT COURT OF EAU CLAIRE COUNTY

EABLE S. WELCH, Plaintiff.

v.

ROBERT K. HENRY and SOLOMON LEVITAN, as State Treasurer of the State of Wisconsin, Defendants

JUDGMENT—Filed October 27, 1937

An order having been entered in this action, on the 27th day of October, 1937, sustaining the demurrer to the amended complaint herein and giving the plaintiffs leave to amend their complaint herein within twenty days after service of such order upon their attorneys, and the plaintiff's attorneys having appeared in court and waiving any and all service of such order upon them and reserving an exception to said order and electing to file no further complaint and consenting that the court shall forthwith and in an orderly manner proceed with this cause, and

On motion of Orland S. Loomis, Attorney General, and A. G. Hawley, Assistant Attorney General, attorneys for the defendants,

It is Ordered and Adjudged that the complaint herein be, and the same hereby is dismissed without costs being taxed to either party.

Dated October 27, 1937.

By the Court.

James Wickham, Circuit Judge.

[fols. 53-55] [File endorsements omitted.]

[fols. 55-57] IN SUPREME COURT OF WISCONSIN

Eau Claire Circuit Court

EARLE S. WELCH, Appellant,

VS.

ROBERT K. HENRY and SOLOMON LEVITAN, as State Treasurer
of the State of Wisconsin, Respondents

JUDGMENT—January 14, 1938

This cause came on to be heard on appeal from the judgment of the Circuit Court of Eau Claire County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Eau Claire County, in this cause, be, and the same is hereby, affirmed.

[fol. 58]

[File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

EARLE S. WELCH, Appellant,

VS.

ROBERT K. HENRY and SOLOMON LEVITAN, as State Treasurer
of the State of Wisconsin, Respondents

Appeal from a judgment of the circuit court for Eau Claire County. James Wickham, Circuit Judge. Affirmed.

OPINION—Filed Jan. 15, 1938.

This action was begun by Earle S. Welch, Plaintiff, against Robert K. Henry and Solomon Levitan as Treasurer of the State of Wisconsin, defendants, to recover certain taxes paid by the plaintiff under protest. There was a demurrer to the complaint. The demurrer was sustained. The plaintiff did not amend and judgment was entered on October 27, 1937, dismissing the plaintiff's complaint, from which judgment the plaintiff appeals.

[fols. 59-62] Per CURIAM:

This case was before this Court and reported in Welch v. Henry (1937), 223 Wis. 319, 271 N. W. 68, to which refer-

ence is made for a statement of facts. On the former appeal and upon this appeal the plaintiff contends that the statute in question offends Sec. 1 of the fourteenth amendment to the constitution of the United States. Upon the former appeal this Court considered and rejected the plaintiff's contention that the act in question violated his rights under sec. 1 of the fourteenth amendment to the constitution of the United States. We have reconsidered plaintiff's contention and find nothing in the act violative of the plaintiff's rights under said section 1 of the fourteenth amendment. Reference is made to the opinion in that case and for the reasons there stated the judgment appealed from is affirmed.

Judgment affirmed.

[fol. 63]

[File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed February 17, 1938

The appellant in the above entitled suit having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of Wisconsin on the 15th day of January, 1938, and from each and every part thereof, and having presented and filed a petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is Now Here Ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Wisconsin shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said court within forty days of this date.

It is Further Ordered that security for costs on appeal be fixed in the sum of \$500.00.

Dated: February 17, 1938.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin.

[fols. 64-135] Service of copy of within admitted this 17th day of February, A. D. 1938.

Orland S. Loomis, Attorney General of Wisconsin,
by Harold H. Persons, Assistant Attorney General.

[fol. 136] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION
OF PARTS OF RECORD TO BE PRINTED—Filed March 24,
1938

Comes now Earle S. Welch, the appellant in the above entitled cause, and a resident of the State of Wisconsin, and states that the points upon which he intends to rely in this court in this case are as follows:

1. Section 6 of Chapter 15 of the Laws of Wisconsin of 1935 purporting to assess the taxes herein sought to be recovered back by appellant is in violation of the provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States that no state shall deny to any person within its jurisdiction the equal protection of the laws, and the Supreme Court of the State of Wisconsin erred in holding to the contrary.

2. Section 6 of Chapter 15 of the Laws of Wisconsin of 1935 purporting to assess the taxes herein sought to be recovered back by appellant is in violation of the provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States that no state shall deprive any person of life, liberty or property without due process of law, and the Supreme Court of the State of Wisconsin erred in holding to the contrary.

[fol. 137] Appellant further states that only the following parts of the record as filed in this court, are deemed

necessary to be printed for the consideration of the points set forth above, viz:

| Title of Paper | Record Page |
|--|-------------|
| Plaintiff's amended complaint | 40-47 |
| Defendants' demurrer to amended complaint | 48-49 |
| Judgment of circuit court of October 27, 1937 dismissing plaintiff's amended complaint | 52-53 |
| Judgment of Wisconsin Supreme Court Jan. 14, 1938 affirming judgment of circuit court | 56 |
| Opinion of Wisconsin Supreme Court Jan. 15, 1938 | 57-59 |

Dated March 21, 1938.

John M. Campbell, Attorney for Appellant.

[fol. 138] Due personal service on us of a copy of within Statement of Points to be Relied upon and designation of parts of record to be printed is hereby admitted this 21st day of March, 1938.

Orland S. Loomis, Attorney General of the State of Wisconsin. Joseph E. Messerschmidt, Assistant Attorney General of the State of Wisconsin. Harold H. Persons, Assistant Attorney General of the State of Wisconsin.

[fol. 139] [File endorsement omitted.]

[fol. 140] IN SUPREME COURT OF THE UNITED STATES

COUNTER DESIGNATION OF PARTS OF RECORD TO BE PRINTED—
Filed April 9, 1938

Comes Now the Appellees in the above-entitled cause and designate that the following parts of the record, as filed in this Court, in addition to those designated by the Appellant, are deemed necessary to be printed for the consideration of the Court herein, to wit:

| Title of Paper | Record Page |
|--|-------------|
| Plaintiff's Original Complaint | 5-12 |
| Defendants' Demurrer to Complaint | 13-14 |
| Order of Circuit Court of February 7, 1936, Overruling Demurrer to Complaint | 23-24 |

| | |
|--|-------------|
| Title of Paper | Record Page |
| Opinion of Wisconsin Supreme Court of January 12, 1937 | 23 |
| Judgment of Wisconsin Supreme Court, January 12, 1937 | 24 |

Dated April 6, 1938.

Orland S. Loomis, Attorney General of the State of Wisconsin. Joseph E. Messerschmidt, Assistant Attorney General of the State of Wisconsin. Harold H. Persons, Assistant Attorney General of the State of Wisconsin.

[fol. 141] Harold H. Persons, being first duly sworn, on oath deposes and says that he is Assistant Attorney General of the State of Wisconsin; that on the 7th day of April, A. D. 1938, he made service of the attached Counterdesignation of Parts of Record to be Printed on John M. Campbell, Attorney for the Appellant by then and there depositing a true copy thereof in a sealed envelope, addressed to said John M. Campbell, Attorney at Law, 401-408 S. A. F. Building, Eau Claire, Wisconsin, with postage duly prepaid, in the Postoffice at the City of Madison, County of Dane, State of Wisconsin.

Harold H. Persons

Subscribed and sworn to before me this 7th day of April, 1938. Warren H. Resh, Notary Public Dane County, Wisconsin. My commission expires May 12, 1940. (Seal.)

[fol. 142] [File endorsement omitted.]

Endorsed on cover: File No. 42,369. Wisconsin Supreme Court. Term No. 888. Earle S. Welch, appellant, vs. Robert K. Henry and Solomon Levitan, State Treasurer of the State of Wisconsin. Filed March 21, 1938. Term No. 888, O. T., 1937.

